78-881

No.



# In the Supreme Court of the United States

OCTOBER TERM, 1978

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UNITED STATES OF AMERICA, PETITIONER

*v.*

JOHN ARTHUR SCOTT

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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## CITATIONS

Cases:

# In the Supreme Court of the United States

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

---

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

## OPINIONS BELOW

The initial opinion of the court of appeals is reported at 544 F.2d 903. The second opinion of the court of appeals (App. A, *infra*, 1a-3a), upon remand from this Court, is reported at 579 F.2d 1013. The oral opinion of the district court (App. C, *infra*, 5a-9a) is not reported.

## JURISDICTION

The judgment of the court of appeals was entered on August 4, 1978. A timely petition for rehearing was denied on October 4, 1978 (App. B, *infra*, 4a). On October 23, 1978, Mr. Justice Stewart extended the time within which to file a petition for a writ of certiorari to and including December 3, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether an indictment that is returned within six months of the commission of an offense may properly be dismissed on due process grounds of preindictment delay, when the delay resulted principally from the conduct of an ongoing criminal investigation of the defendant, and the only prejudice resulting from the delay is impairment of the defendant's memory of events on the day of the alleged offense.

## CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution provides in relevant part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

## STATEMENT

Since this case has been before this Court once before, *United States* v. *Scott*, No. 76-1382 (June 14, 1978), the essential facts may be summarized briefly.



Respondent, a member of the Muskegon, Michigan, police force, was arrested on January 22, 1975, on a complaint charging him with violating the federal narcotics laws. Thereafter, on March 5, 1975, he was indicted for distributing cocaine on September 20, 1974 (Count I), distributing codeine on September 24, 1974 (Count II), and distributing heroin on January 22, 1975 (Count III). All of these transactions were alleged to have violated 21 U.S.C. 841(a)(1).

Prior to trial, respondent moved to dismiss Counts I and II of the indictment on the ground that the delay of less than six months between the commission of the September 1974 offenses and the initiation of the prosecution violated the Due Process Clause of the Fifth Amendment.[1] The motion alleged that the government had intentionally and unnecessarily postponed commencement of respondent's prosecution and that this preindictment delay had prejudiced respondent insofar as he and his potential witnesses were unable to recall accurately the facts and circumstances of the offenses. At the pretrial hearing on the dismissal motion, government counsel informed the court that the existence of an ongoing government

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[1] Approximately 5½ months elapsed between the September 20 transaction, which was the subject of Count I, and the indictment. With regard to Count II, the period of delay was only four months, because the September 24 transaction was specified in the arrest complaint issued on January 22, 1975. This petition is concerned only with Count I, see note 4, *infra*, and the remainder of the petition will therefore focus only on the 5½ month preindictment hiatus.

investigation into respondent's criminal activities, the absence of a standing grand jury and the desire to protect an informant's cover were the concurrent causes of the preindictment delay (H.Tr. 10-11; Tr. 292-294).[2] The motion was denied without prejudice to renewal at a later time.

Respondent's trial began on December 1, 1975. The evidence presented by the prosecution showed that respondent, a member of the narcotics unit of the Muskegon police force, had gone into the drug business for himself, as evidenced by his sales of narcotics to Robert Jordan, a Drug Enforcement Administration informant (Tr. 11-36, 166-175, 198-204). Specifically, Jordan testified that on September 20, 1974, he bought three-quarters of an ounce of cocaine from respondent for a $150 down payment. The cocaine was apparently obtained from the police store of confiscated drugs (Tr. 18-20). Similarly, four days later respondent transferred another quantity of what was alleged to be cocaine (it was actually codeine) to Jordan for $500 (Tr. 21-23, 171-175). The latter transaction was witnessed in part by Clifford Best, a Drug Enforcement Administration undercover agent, with whom respondent discussed the sale of a pound of cocaine for $15,000 (*ibid.*).

In addition, another government agent testified as to an ongoing government investigation of respond-

[2] "Tr." refers to the transcript of respondent's trial. "H.Tr." refers to the transcript of a pretrial hearing concerning the preindictment delay issue that was held on September 25, 1975.



ent during the period between the September transactions and the indictment. In accordance with the agents' standard procedures, they allowed respondent to continue distributing drugs at that time in order to determine whether other officers were involved with respondent, what respondent's status was in the narcotics trade, and where respondent obtained his drugs (Tr. 292-294).

At the close of the prosecution's case, respondent renewed his motion to dismiss Counts I and II because of preaccusation delay. The court again denied this motion, and respondent presented his defense. Respondent's evidence indicated that he dealt with Jordan only in the line of official duties. The theory of the defense was that Jordan had "set up" respondent so that Jordan would be able to distribute drugs with less risk to himself. Respondent took the stand and testified about the transactions of September 24 and January 22; respondent contended, however, that he could not remember the events of September 20 (Tr. 313-317, 323-324, 338-339, 353, 400-404, 515-519, 536).

After all of the evidence had been received, respondent again moved to dismiss Counts I and II because of preindictment delay. This time the district court granted the motion. The district court stated that Count I should be dismissed because intentional delay had prejudiced respondent. The prejudice, the court concluded, lay in respondent's inability to recall the events of September 20 (see App. C, *infra*, 5a-6a). The delay was impermissible, the court explained, be-

cause it was for the purpose of gaining a tactical advantage over respondent—the delay was intended to allow respondent to commit additional crimes and thus to increase the probability that he would be convicted (*id.* at 7a).[3]

The United States sought to appeal the dismissal of Counts I and II, but the Sixth Circuit concluded that the Double Jeopardy Clause bars a government appeal from an order entered during trial dismissing an indictment. 544 F.2d 903. Subsequently, this Court granted the government's petition for a writ of certiorari and reversed the court of appeals, holding that "where the defendant himself seeks to have the trial terminated without any submission to either judge or jury as to his guilt or innocence, an appeal by the Government from his successful effort to do so is not barred by 18 U.S.C. § 3731." *United States* v. *Scott*, 76-1382 (June 14, 1978), slip op. 18.[4]

On remand, the court of appeals, without the benefit of any additional briefing or oral argument, summarily affirmed the district court's order of dismissal (App. A, *infra*, 1a-3a). The court's *per curiam* opinion simply concluded "that the district court's finding that the preindictment delay resulted in prejudice to the [respondent] is not clearly erroneous, and that the

[3] The jury did consider Count III and found respondent not guilty of that charge.

[4] The United States did not petition for a writ of certiorari with regard to Count II. Thus, only Count I is still in issue.



district court did not abuse its discretion in granting [his] motion to dismiss * * *." The government then timely petitioned the court of appeals for a rehearing in light of this Court's opinion in *United States* v. *Lovasco*, 431 U.S. 783 (1977), which had been decided subsequent to the district court's order of dismissal and the first court of appeals' decision in this case. On October 4, 1978, the petition was denied (App. B, *infra*, 4a).

## REASONS FOR GRANTING THE PETITION

The decision of the court of appeals, which follows this Court's remand last Term for consideration of the merits of the preindictment delay question, is squarely in conflict with *United States* v. *Lovasco*, 431 U.S. 783 (1977), and with the decisions of every other court of appeals that has addressed the preindictment delay issue since *Lovasco*.[5] Moreover, the court of appeals' cursory action on remand, which failed to allow the parties an opportunity for briefing or argument and which resulted in a decision that completely ignores this Court's applicable precedent, constitutes such a substantial departure from the accepted and usual course of judicial proceedings as to warrant the exercise of the Court's power of supervision. See Sup. Ct. R. 19(1)(b). If the Court agrees that the review is warranted and that the decision below is irreconcilable with *Lovasco*, we respectfully

[5] See note 7, *infra*.

suggest that it may deem summary reversal appropriate.

1. At the outset, we note that the court of appeals incorrectly held the "clearly erroneous" and "abuse of discretion" standards applicable in reviewing the district court's decision dismissing Count I.[6] Although a district court's findings as to the *bona fides* of a defendant's claim of diminished memory or the government's reasons for delaying the commencement of a prosecution would generally be subject to the clearly erroneous standard of review, such essentially factual questions were not before the court of appeals. Rather, as explicated in point 2, *infra*, the thrust of the government's position concerns the legal issues whether a defendant's faded memory constitutes prejudice implicating the Due Process Clause, and, if so, whether the government's uncontradicted reasons for delaying respondent's indictment justified the minimal delay involved in this case. These purely legal questions afford no basis for use of a deferential "abuse of discretion" standard, see *United States* v. *Lovasco*, *supra*, 431 U.S. at 797-799 (Stevens, J., dissenting), and the court of appeals' invocation of that standard magnifies its substantive errors, to which we now turn.

[6] The court of appeals concluded that the district court did not abuse its discretion in dismissing both Counts I and II (App. A, *infra*, 2a). However, as previously stated, only Count I remained at issue following the government's prior petition in this case. See note 4, *supra*.



2. Three factors bear upon the question whether a defendant in a criminal case has been deprived of due process by a delay between the commission of the offense and the institution of criminal proceedings: the length of the delay, the reasons for the delay, and the nature and extent of prejudice to the accused's ability to defend against the charges as a result of the delay. Thus, in *United States* v. *Lovasco*, *supra*, this Court held that an 18-month preindictment delay that resulted in the absolute loss of the testimony of two material defense witnesses did not warrant dismissal of the indictment. The Court stated that "to prosecute a defendant following investigative delay does not deprive him of due process, even if his defense might have been somewhat prejudiced by the lapse of time." 431 U.S. at 796. Nonetheless, the court of appeals summarily affirmed the dismissal in this case on the basis of less than six months' preindictment delay attributable in main part to further investigation of the defendant's activities and entailing prejudice only in the form of dimmed memory of events. Such a result is wholly inconsistent with this Court's decision in *Lovasco* as well as with the decisions of every other court of appeals that has considered preindictment delay claims since *Lovasco*.[7]

[7] See, *e.g.*, *United States* v. *Algarin*, No. 76-1561 (1st Cir. Sept. 29, 1978) (more than two-years' delay); *United States* v. *Francisco*, 575 F.2d 815 (10th Cir. 1978) (15-month delay); *United States* v. *Pallan*, 571 F.2d 497, 498-500 (9th Cir.), cert. denied, 436 U.S. 911 (1978) (18-month delay); *United States* v. *Stacey*, 571 F.2d 440, 443 (8th Cir. 1978) (16-month

a. The period of delay in this case, as noted, was only 5½ months. We submit that, at least in the absence of exceptional circumstances not present here, such a limited delay precludes any due process preindictment delay claim. See *United States* v. *Jones*, 524 F.2d 834, 840 (D.C. Cir. 1975) (delays of less than four months generally require no explanation); *United States* v. *Silva*, 449 F.2d 145, 146 (1st Cir. 1971). Indeed, we are aware of no case other than the present one in which a delay of less than a year was deemed sufficient to justify dismissal of an indictment as a matter of constitutional law.[8]

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delay); *United States* v. *Medina-Arellano*, 569 F.2d 349, 352-353 (5th Cir. 1978) (4-year delay); *United States* v. *Lane*, 561 F.2d 1075, 1077 (2d Cir. 1977) (several years' delay); *United States* v. *Juarez*, 561 F.2d 65, 67-68 (7th Cir. 1977) (20-month delay). See also *United States* v. *Pollack*, 534 F.2d 964, 969-970 (D.C. Cir.), cert. denied, 429 U.S. 924 (1976) (more than three-years' delay); *United States* v. *King*, 521 F.2d 356, 358 (6th Cir. 1975) (10-month delay).

[8] Prior to *Lovasco*, the District of Columbia Circuit dismissed several narcotics indictments because of preindictment delay of less than one-year's duration. See *Ross* v. *United States*, 349 F.2d 210 (1965); *Godfrey* v. *United States*, 358 F.2d 850 (1966); *Woody* v. *United States*, 370 F.2d 214 (1966) (but see Burger, J., dissenting). These cases generally involved a conviction based on a government agent's questionable ability to identify the defendant after a single transaction and a government delay justified solely on the ground of protecting the government agent's undercover identity. In any event, as noted by this Court in *United States* v. *Marion*, 404 U.S. 307, 317 n.8 (1971), this line of cases relied upon the court of appeals' purported supervisory power. See also *United States* v. *Jones*, *supra*, 524 F.2d at 840. Moreover, these cases have been rejected or limited to their peculiar facts both without, see, *e.g.*, *United States* v. *Emory*, 468 F.2d 1017 (8th Cir. 1972) (collecting cases), and within the District of Columbia Circuit. See, *e.g.*, *United States* v. *Pollack*, *supra*, 534 F.2d at 969-970; *United States* v. *Jones*, *supra*.



b. Even if it is assumed that the delay in this case was not too short to warrant inquiry into its causes and consequences, the district court erred in its evaluation of respondent's claim of prejudice. The principal prejudice that the district court found respondent to have suffered as a result of the preindictment delay in this case was his alleged inability to recall the events of September 20, the date of the charged cocaine distribution. It is settled, however, that a simple allegation of impaired memory does not satisfy the requirement of actual, substantial prejudice established by this Court and others as a prerequisite to a claim of preindictment delay. See, *e.g.*, *United States* v. *Marion*, 404 U.S. 307, 321-324 (1971); *United States* v. *Juarez*, 561 F.2d 65, 67-68 (7th Cir. 1977); *United States* v. *King*, 560 F.2d 122, 131 (2d Cir.), cert. denied, 434 U.S. 925 (1977); *United States* v. *Avalos*, 541 F.2d 1100, 1108 (5th Cir. 1976), cert. denied, 430 U.S. 970 (1977); *United States* v. *Quinn*, 540 F.2d 357, 362 (8th Cir. 1976); *United States* v. *Jones*, *supra*, 524 F.2d at 843; *United States* v. *Zane*, 489 F.2d 269 (5th Cir. 1973), cert. denied, 416 U.S. 959 (1974); *United States* v. *Baker*, 424 F.2d 968, 970 (4th Cir. 1970).[9]

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[9] The district court also suggested that respondent may have been prejudiced in his ability to defend himself by the

c. Nor did the court of appeals consider the reasons for the relatively brief delay in indicting respondent, despite this Court's statement in *Lovasco* (431 U.S. at 790) that "proof of prejudice is generally a necessary but not sufficient element of a due process claim, and * * * the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused." See also *United States* v. *Marion*, *supra*, 404 U.S. at 324-326. This constitutes an additional and significant error in the disposition of this case.

The uncontradicted record showed that the primary reason for the delay between the date of the alleged offense and the indictment in this case was a bona fide government investigation into the nature and extent of respondent's drug distribution activities, and the source of his drugs (Tr. 292-294; H. Tr. 10). In addition, government counsel advised the court that the lack of a standing grand jury and the desire to preserve the informant's cover were also factors contributing to the brief delay of less than six months (H. Tr. 10-11).

Although the district court characterized the reason for the delay as "principally to gain tactical advantage over this Defendant—to gather more evidence of alleged offenses by him" (App. C, *infra*, 7a), it is clear that these were entirely legitimate sources of delay that foreclose any due process claim. As the Court stated in *Lovasco* (431 U.S. at 795): "investigative delay is fundamentally unlike delay undertaken by the Government solely 'to gain tactical advantage over the accused' * * *." Cf. *Hoffa* v. *United States*, 385 U.S. 293, 310 (1966) ("Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause * * *."). Insofar as the delay resulted from desire to protect an informant and lack of an available grand jury, the district court attached no finding of impropriety to these circumstances, and we think it plain that it could not correctly do so, especially where the delay involved was so brief. See, *e.g.*, *United States* v. *Jones*, *supra*, 524 F.2d at 839-841; *United States* v. *Jackson*, 504 F.2d 337, 340 (8th Cir. 1974), cert. denied, 420 U.S. 964 (1975); *Wilson* v. *United States*, 409 F.2d 184, 186 (9th Cir.), cert. denied, 395 U.S. 983 (1969). Cf. *United States* v. *Lovasco*, *supra*, 431 U.S. at 797 n.19.

In sum, the court of appeals should have heeded this Court's admonition in *Lovasco* (*id.* at 796) that "investigative delay does not deprive [a defendant] of due process, even if his defense might have been somewhat prejudiced by the lapse of time," and should have reversed the dismissal of Count I of the indictment. The failure to do so represents a suf-

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fact that additional charges were leveled against respondent relating to crimes allegedly committed by him after the September 20 offense (App. C, *infra*, 7a). We think it patent that any such factor cannot be invoked as prejudice supporting dismissal of an indictment on delay grounds. See, *e.g.*, *United States* v. *Algarin*, *supra*, slip op. 9-10. If the accumulation of charges against respondent unfairly prejudiced his defense (which we submit it did not in this case), the remedy was severance, not dismissal.

ficiently egregious departure from this Court's precedents to warrant review.[10]

[10] We cannot state with any assurance that the decision of the court of appeals will prove to have a substantial effect on other cases, because the brief opinion fails to state and analyze the operative facts and to discuss the substance of the legal issues presented. Nevertheless, the court's acceptance of the proposition that a delay of less than six months for purposes of bona fide investigation can support dismissal of an indictment cannot help but have some deleterious impact on the conduct of future federal criminal investigations in districts within the Sixth Circuit, tending to curtail the usefulness of undercover agents and to bring about some of the evils that the Court noted in *Lovasco* and that were addressed at greater length in our brief in that case, a copy of which we are sending to respondent's counsel.



## CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal.

Respectfully submitted.

LAWRENCE G. WALLACE
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DECEMBER 1978

* The Solicitor General is disqualified in this case.

**APPENDIX A**

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 76-1533

[Filed Aug. 4, 1978]

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

*v.*

JOHN ARTHUR SCOTT, DEFENDANT-APPELLEE

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ORDER

Before: PHILLIPS, Chief Judge, WEICK, Circuit Judge, and PECK, Senior Circuit Judge.

By per curiam opinion filed herein November 23, 1976, we held that this Court was without jurisdiction to consider this appeal on the basis of "what has been referred to as the *Wilson-Jenkins-Serfass* trilogy." In present context, *Jenkins* lies at the heart of the trilogy and was thus the underlying basis of our opinion, as the Supreme Court recognized in observing, "We have . . . decided to overrule *Jenkins*, and thus to reverse the judgment of the Court of Appeals in this case." *United States* v. *Scott*, —— U.S. ——, No. 76-1382, decided June 14, 1978, slip opinion p. 4. Before us for "further proceedings," we turn to a consideration of the merits of the appeal.

As we stated in our earlier per curiam opinion, *United States* v. *Scott*, 544 F.2d 903 (1976), "Defendant-appellee was charged in a three-count indictment with the distribution of cocaine, codeine and heroin. The counts related to separate occurrences, and because a substantial period had elapsed between the commission of the offenses charged in counts 1 and 2 a motion for their dismissal on the ground of preindictment delay was filed prior to trial, which was denied without prejudice. At the jury trial the motion was renewed at the conclusion of the government's case, and it was again denied without prejudice. Subsequently, after the defense had presented its case and had rested, the motion to dismiss was renewed and it was then granted by the district court on the basis of preindictment delay and prejudice the district judge found that it caused to defendant's case. The jury thereafter returned a verdict of not guilty as to count 3, and the present appeal is purported to have been perfected by the government from the order dismissing counts 1 and 2 of the indictment."

We conclude, upon a review of the record on appeal, that the district court's finding that the preindictment delay resulted in prejudice to the defendant-appellee's case is not clearly erroneous, and that the district court did not abuse its discretion in granting defendant-appellee's motion to dismiss counts 1 and 2 of the indictment. Accordingly,



IT IS ORDERED that the judgment of the district court be and it hereby is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
JOHN P. HEHMAN
Clerk of Court

Copy of Judgment of 8/4/78
Issued as Mandate: October 18, 1978
Costs: None

## APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 76-1533

[Filed Oct. 4, 1978]

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

*v.*

JOHN ARTHUR SCOTT, DEFENDANT-APPELLEE

---

ORDER

Before: PHILLIPS, Chief Judge, WEICK, Circuit Judge, and PECK, Senior Circuit Judge.

Plaintiff-appellant's petition for rehearing having come on to be considered and of the judges of this Court who are in regular active service less than a majority having favored ordering consideration en banc, the petition has been referred to the panel which heard the appeal, and it further appearing that the petition for rehearing is without merit.

IT IS ORDERED that the petition be, and it hereby is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
JOHN P. HEHMAN
Clerk of Court



## APPENDIX C

ORAL OPINION

OF

HONORABLE NOEL P. FOX, Chief Judge

United States District Court
Western District of Michigan

December 5, 1975

THE COURT: The Defendant has renewed his motion to dismiss Counts I and II based on the delay between the date the offenses are alleged to have occurred and the time he was charged.

I hereby grant the motion to dismiss with respect to Count I.

The Defendant testified with a good deal of specificity as to the occurrence on September 24, 1974, that is, the alleged offense in Count II.

In the Count with respect to Count I involving an alleged offense of September 20, 1974, the Defendant was able to give only a general denial. He could not recall the specifics of what happened on that date. I find the prejudice shown with respect to Count I caused by the preindictment delay was sufficient to result in the dismissal of that Count.

I note that the Defendant's testimony was given before the jury considering his guilt or innocence and not simply presented in separate hearing before me.

In addition, it is not insignificant that Bobby Jordan also had some difficulty remembering the details of the September events, even though he had the benefit of written statements.

Furthermore, the difference in the Defendant's ability to recall events of September 20th and events of September 24th is not without reason. When the Defendant was arrested on January 22, 1975, a Complaint charged him with the offense alleged that occurred—alleged to have occurred on January 22, 1975 and September 24, 1974. The indictment returned by the Grand Jury on the 5th of March, 1975, added the September 20th offense. This additional delay can explain the differences in the Defendant's ability to recall.

The Government is correct in stating that the issue of preindictment delay is one of balancing of interests. However, as stated above, in this case a balance of those interests results in the dismissal of Count 1.

The problem is to determine how much, if any, prejudice need be shown, based on the Government's reason for the delay. The quantum of prejudice which need be shown will vary with the circumstances. U.S. versus Marion, cited in 404 U.S. Supreme Court 307, 1971. For delay which is completely unintentional a defendant will have to show at least substantial actual prejudice.

On the other hand, if the delay is caused by the Government, intending to prejudice the Defendant's opportunity to present a defense, only a minimal amount of prejudice, if any, may be required. In between these two extremes will be a variety of instances of intentional but legitimate delay. See, for example, United States versus King, 521 Fed. 2d 356, 6th Circuit case. Each case must be considered on the basis of the totality of the circumstances peculiar to it. U.S. versus Marion, supra.



Here the reason for the delay was principally to gain tactical advantage over this Defendant—to gather more evidence of alleged offenses by him. Obviously the more charges which can be brought against one defendant in one proceeding the more likely the jury will not believe an innocent explanation of a single count or a single charge. Prejudice to the Defendant's ability to present his defense was not intended, but such was the result of Count I.

I want to repeat and emphasize the delay here was the result of the Government's intentional choice, with the principal motive being to gather evidence of further crimes, further alleged crimes by the Defendant in order to gain a tactical advantage at the trial. In such a situation the Defendant may show a lesser degree of prejudice to justify dismissal than where the reason for delay is neutral as respects the particular defendant charged.

I do not decide whether the degree of prejudice shown here would be sufficient for dismissal if the reason for delay was neutral. I hold only that since the delay resulted primarily from an attempt to gain a tactical advantage, this Defendant has presented sufficient proof of prejudice with respect to Count I.

However, evidence of the charge involved in Count I

is admissible to the same extent as evidence of any other alleged criminal action by the Defendant. See U.S. versus Jones, the Federal Rules of Evidence for the United States in the United States Courts 405.

The Defendant's denial of ever having distributed narcotics tempers the delay-induced prejudice sufficiently to allow evidence to be received as relevant to the other charges.

I am still a little concerned about September 24th because of some of the totalities of the circumstances in this case. Here is a black officer, the only black officer ever to serve in the unit. He was denied help when again and again he asked for help. That is a jungle out there. The Defendant's theory is that he was left alone, and being left alone he had to devise his own means of surviving in that jungle, and that he was in the process of trying to eliminate what he contended was a big operator, the Government's informant Jordan.

There is evidence in the record from which the jury can conclude that the Defendant's evidence was correct.

One of the problems is, in this case, as I see it, is the very heavy burden which the Defendant had to carry when he was in that jungle. And what—here was an officer. He was brought up from the patrol and tossed into the thicket of a highly sophisticated area of activities. And of all the things he had to try to remember in that kind of a circumstance he may have forgotten crucial testimony essential to his defense.



I am going to dismiss Count II, as well.

I am not setting a precedent in that regard. I am doing it solely out of the peculiar circumstances of this case. The Defendant in this case should not have been out there in that jungle alone. And what I am concerned about is a compromise verdict which may result if he were to be—had to stand trial all the way on the three counts.

And it is so ordered.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1978 278154 204